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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 465

IRA S. BUSHEY AND SONS, INC., AND THE STATE INSURANCE FUND, INSURANCE CARRIER, PETITIONERS

*v.*

FRANK A. CARDILLO, DEPUTY COMMISSIONER, SECOND COMPENSATION DISTRICT, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR DEPUTY COMMISSIONER CARDILLO IN OPPOSITION

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### OPINIONS BELOW

The order of Deputy Commissioner Cardillo awarding compensation to the claimant (R. 9a-12a) is not reported. The opinion of the United States District Court for the Eastern District of New York (R. 30a-33a) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. B, 24-39) is reported at 225 F. 2d 137.

### JURISDICTION

The judgment of the Court of Appeals was entered July 19, 1955 (Pet. 40-41). The petition for a writ of certiorari was filed October 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

1. Whether the award of compensation to a claimant under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, for an injury for which compensation is provided by schedule in Section 8 of that Act, must be predicated on impairment of the claimant's present wage-earning capacity.

2. Whether the provision of the Longshoremen's and Harbor Workers' Compensation Act that compensation shall be awarded for "occupational disease" is an unconstitutional delegation of legislative power to the deputy commissioner.

3. Whether it was unlawful to impose sole liability for the award upon the carrier which insured the employer as of the time the claimant discovered that he was suffering from the work-connected occupational disease.

### STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * *

COVERAGE

Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

COMPENSATION FOR DISABILITY

Sec. 8. Compensation for disability shall be paid to the employee as follows:

* * * * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

* * * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance

of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

* * * * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * * *

SUBSTITUTION OF CARRIER FOR EMPLOYER

SEC. 35. In any case where the employer is not a self-insurer, in order that the liability

for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the commission, or any court under this Act shall be jurisdiction of the carrier, and (3) any requirement by a deputy commissioner, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

INSURANCE POLICIES

Sec. 36. (a) Every policy or contract of insurance issued under authority of this Act shall contain (1) a provision to carry out the provisions of section 35, and (2) a provision that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the carrier from payment of compensation for

disability or death sustained by an employee during the life of such policy or contract.

* * * * *

STATEMENT

The claimant, Thorlief Johansen, was employed continuously for eleven years prior to September 16, 1953, by petitioner Ira S. Bushey and Sons, Inc., as an iron worker, shipfitter, and ship carpenter in the repair of vessels (R. 10a).[1] In his work, claimant was constantly exposed to loud and injurious noises; in December, 1952, he experienced recurring ringing and buzzing in his ears, and in late January, 1953, he noticed a slight impairment in his hearing which he believed was temporary (R. 10a-11a). The impairment persisted and increased, and on September 16, 1953, claimant was informed by an ear specialist that he had a permanent loss of hearing as a result of his employment (R. 11a). On October 5, 1955, he filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, with the deputy commissioner, who found that claimant had sustained an "injury, occupational in character * * * equivalent to 13.8 per cent binaural loss of hearing" (R. 11a). There was no evidence of any loss of earning capacity, and there was testimony that claimant was not "industrially disabled" (this being defined as "in any way

[1] Johansen had also been employed by the petitioner-employer from April, 1930, until 1940, with the exception of a six-month period in 1936 (R. 40a).

handicapped" by the impairment, or as under an "incapacity to earn wages") (R. 73a, 96a).

During the period of claimant's employment, the petitioner-employer was covered by three successive insurance carriers. These were the American Policy Holders' Company and/or American Mutual Liability Company, from 1942, to June 1, 1953; Hartford Accident and Indemnity Company from June 1, 1953, to September 9, 1953; and petitioner State Insurance Fund from September 9, 1953, to September 16, 1953. The deputy commissioner awarded claimant compensation of $35 a week for 27.6 weeks, and ordered that the compensation should be paid "jointly, severally and equally" by the three insurance carriers (R. 12a). The employer and all three carriers brought a complaint in the United States District Court for the Eastern District of New York to review the decision of the deputy commissioner (R. 2a-8a). On cross-motions for summary judgment, that court directed judgment for the deputy commissioner (R. 21a-22a). This decision was appealed in a consolidated proceeding with two other cases involving similar circumstances. The United States Court of Appeals for the Second Circuit affirmed the decision of the deputy commissioner that the claimant was entitled to compensation, but reversed his direction that the three carriers be equally liable for the award. The court stated that a partial loss of hearing was covered by the "schedule losses" in Section 8(c) of the Longshoremen's Act and that no proof of an impairment of earning

capacity was necessary for an award of compensation for such an injury (Pet. App. B, 33-35). It ruled further that "the carrier who last insured the 'liable' employer during the claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer" (Pet. App. B, 39).

ARGUMENT

1. The deputy commissioner found that, as a result of the claimant's employment in the repair of vessels and the consequent constant exposure to loud and injurious noises, he sustained an "injury, occupational in character, consisting of permanent binaural impairment of hearing" and that this injury "arose naturally out of such employment" (R. 10a). This finding was fully supported by medical and other testimony and is not disputed by petitioners.

Under the Longshoremen's and Harbor Workers' Compensation Act, the compensation to be paid for a loss of hearing is to be determined by schedule. Section 8 of that Act, 33 U. S. C. 908, provides that:

> Compensation for disability shall be paid to the employee as follows:
>
> * * * * *

> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages * * * and shall be paid to the employee, as follows:
>
> * * * * *
>
> (13) Loss of hearing. Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.
>
> * * * * *
>
> (19) Partial loss or partial loss of use. Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

In the instant case, the deputy commissioner found that the claimant suffered a 13.8 per cent binaural loss of hearing, and accordingly he directed the payment of compensation for 27.6 weeks.

The quoted provisions, it will be noted, make no reference to the impairment of the claimant's earning capacity, nor do they justify a holding that such an impairment must be found before compensation can be awarded. The conclusion is fortified by the explicit provision in subsection (21) of Section 8(c) that in all cases of permanent partial disability, *other than those covered by a specific schedule,* compensation shall be based on diminution of earning capacity. The decision below is supported, moreover, by the uniform interpretation of similar

schedules in state workmen's compensation law.[2] Thus, a leading commentator has stated that payments under scheduled losses "are not dependent on actual wage loss" and that "[e]vidence that claimant has been regularly employed at greater earnings than before is completely immaterial." 2 Larson, *Workmen's Compensation*, § 58.10. This does not mean, of course, that the schedules represent a rejection of the principle that workmen's compensation is directed at the impairment of earning capacity. On the contrary, what it does mean is that in these instances the injury's "effect on earning capacity is a conclusively presumed one." 2 Larson, *Workmen's Compensation*, § 58.10.[3]

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[2] See, *e.g.*, *Bednar* v. *Ingersoll Rand Co.*, 279 N.Y. 80, 17 N.E. 2d 777; *Slawinski* v. *Williams*, 273 App. Div. 826, 76 N.Y.S. 2d 888, affirmed, 298 N.Y. 546, 81 N.E. 2d 93 (decisions under the New York law have been held by this Court to be particularly relevant to the interpretation of the Longshoremen's Act inasmuch as that Act was based on the New York law, see *Lawson* v *Suwannee Fruit and S.S. Co.*, 336 U.S. 198, 205); *Green Bay Drop Forge Co.* v. *Industrial Commission*, 265 Wisc. 38, 60 N.W. 2d 409; *Shaw* v. *Rosenthal*, 112 Ind. App. 468, 42 N.E. 2d 383; *Mudge Oil Co.* v. *Wagnon*, 193 Okla. 466, 145 P.2d 185. This rule has been applied even in some cases where it has meant that the claimant would be restricted to the scheduled compensation although his actual loss of earning capacity had been far greater. See *e.g.*, *Lente* v. *Lucci*, 275 Pa. 217, 119 A. 132; *Bronson* v. *City of Fremont*, 143 Nebr. 281, 9 N.W. 2d 218.

[3] The fact that in a given case there has been no demonstrated loss of earning power is not only immaterial in the face of such a conclusive presumption, but it does not even render the presumption anomalous. For the presumption may well reflect a legislative determination that any impairment of a physical function will threaten the employee's future earning power, either by reducing the number of his useful

It was also contended below that the "schedule losses" in Section 8(c) (1)-(20) are only intended to apply to cases of "accidental injury" and that the determination of compensation for "occupational disease" falls within the "other cases" provision of Section 8(c)(21). As pointed out by the court of appeals, there is absolutely no basis in the statute or in the legislative history for such a contention. Compensation under the Act is payable "if the disability or death results from an *injury* occurring upon the navigable waters of the United States," Section 3(a), 33 U. S. C. 903(a) (italics added), and "injury" is defined as either "accidental injury" or "occupational disease." Section 2(2), 33 U. S. C. 902(2). As the court below said, "Nothing in the nature of the 'schedule losses' * * * indicates a necessity to treat loss of hearing resulting from accident any differently from loss of hearing resulting from occupational disease" (Pet. App., p. 35). To distinguish the two would create an anomalous distinction between workers with identical work-connected disabilities solely on a basis not sanctioned by the statute.

2. Petitioners also contend that the Longshoremen's and Harbor Workers' Compensation Act is unconstitutional insofar as it directs the award of compensation for disability resulting from "occupational disease." The argument is that in leaving it "to the deputy Commissioners to determine what an occupational disease is; when the date of dis-

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years, or by lessening his chances of obtaining new employment. That the employee's capacity to earn wages in the future may be a factor in determining compensation is indicated by Section 8(h), 33 U.S.C. 908(h).

ablement took effect and which employer shall be liable therefor," Congress has unlawfully delegated its legislative powers without providing "rules of conduct or guides." (Pet. 14.) In support, petitioners cite *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, a case in which this Court sustained, against a contention similar to that made by petitioners here, an Ohio statute delegating to an administrative body the power to license motion pictures. While the validity of that decision with reference to that subject matter is now extremely doubtful, see *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502, the Court's statement concerning delegations of legislative power remains pertinent. The Court declared (236 U. S. at 245-246) that statutory terms,

> like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. * * * If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.

The challenged terms of the Longshoremen's Act get precision from "the sense and experience," not only of the public, but of the boards and commis-

sions which administer workmen's compensation throughout the nation.

Petitioners object that no definition of "occupational disease" is provided by Congress. But the federal courts have not found the term to be so lacking in specificity that its application is impossible or conjectural. On the contrary, for twenty-eight years, there has been general agreement as to its meaning. See, *e. g.*, *Grain Handling Co.* v. *Sweeney*, 102 F. 2d 464 (C. A. 2) (in order to recover for an occupational disease "a workman must be exposed to hazards greater than those involved in ordinary living, and the disease must arise from one of these"). Indeed, this Court has held that recovery may be had for "occupational disease" under the Federal Employers' Liability Act, which does not even contain the term. "Occupational disease," it has concluded, is encompassed by the term "injury." *Urie* v. *Thompson*, 337 U. S. 163.[4]

Petitioners also object that the Deputy Commissioner is given broad authority to determine the date of disablement. Congress need not establish detailed criteria before entrusting such a determination to an administrative body. It is notable that in *Urie* v. *Thompson*, 337 U. S. 163, this Court declared what the controlling date is for an occupa-

[4] Petitioners have pointed to the New York law as one providing the necessary guidance for determining the existence of an "occupational disease." But that Act, since 1935, has provided for compensation for disabilities resulting from "[a]ny and all occupational diseases," without further definition. N. Y. Workmen's Compensation Law, Section 3 (2) (28).

tional disease which does not immediately manifest itself.[5]

Petitioners also urge that it is improper to leave it to the deputy commissioners to determine which employer shall be liable. But it appears clear, as held below, that when Congress rejected a proposal for apportionment among successive employers, it must have intended to impose liability upon the last employer. See discussion, *infra*, point 3. The court of appeals has directed entry of an appropriate order on the basis of this interpretation of the statute. Certainly, this aspect of the case raises no issue as to delegation of powers.

3. The deputy commissioner found that the claimant's loss of hearing resulted from his continual exposure to loud and injurious noises throughout the eleven years that he was working for the petitioner-employer. During this time, the petitioner-employer was insured by three successive carriers. The deputy commissioner directed that all three carriers should be equally liable for the payment of compensation. The court of appeals, however, ruled that under the

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[5] Again, petitioners attempt to find greater certainty in New York law which, they say, fixes "date of disablement as fixed by the Industrial Board." Yet, the only reference in that law which can serve as a guide for the fixing of that date is that "[t]he disablement of an employee resulting from an occupational disease * * * shall be treated as the happening of an accident." N. Y. Workmen's Compensation Law, Section 38. The date of that disablement is left to the Industrial Board with no other guide than the statutory definition of disablement, which is no more certain of application than is the definition in the Longshoremen's Act.

Longshoremen's Act the carrier at the time disability is established should be held responsible for the entire liability of the employer. Upon reconsideration, we are persuaded that this construction conforms to the principles of the Longshoremen's Act and of similar workmen's compensation legislation, and that its adoption by the court below was correct.

In the first place, it seems clear that the Longshoremen's Act contemplates that when disability results from an occupational disease incurred in the claimant's work for several successive employers, the last such employer shall be wholly liable for the disability. That this was the view of Congress is evidenced by its rejection of a proposal that compensation in such cases should be apportioned among the various employers. This rejection took place in the face of an acknowledgment that, absent such a provision, the "last employer" would be liable for the entire award (Pet. App. B, 37-38).[6] For Congress the primary consideration

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[6] See Hearing of House Committee on the Judiciary on H.R. 9498, 69th Cong., 1st Sess. (p. 74):

> Mr. Brown (representing employers): Yes, that is our contention. It may have accumulated, and may not have been attributable at all to the employment by the last employer. The point that we make is that we want some fair proposition inserted in there that would protect that last employer. *Leaving it as it is now, if a disability occurs during his employment, that is enough to put upon the employer at the time the disability occurred the entire expense;* and you are charging an industry with the expense of a hazard which the industry has not incurred. [Italics added]
>
> Mr. Bowling (Congressman): Why not? It is a rule

was that the administration of the Act should not be delayed, complicated, or rendered conjectural by requiring the deputy commissioner to ascertain the degree to which the claimant's work with each successive employer was responsible for his disability. Certainly, there is no reason to believe that Congress presumed that such a disability would be the result wholly of the last employment. It was doubtless aware that the burden of the award would fall disproportionately upon one employer in a given case, yet chose that result as a matter of administrative necessity in the belief that in the long run the burdens would be roughly apportioned among all employers.

Congress did not address itself directly to this question in relation to the situation of successive insurers. Yet, to apportion compensation among the carriers of a single employer would introduce the same problem—with its attendant delays, complexities, and conjectures—which was avoided by

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of employment and the painters are coming in and going out all the time. Why not provide that the present employer shall bear the burden of the man who is suddenly seized with this disease, which every one knows is incident to his employment, but which has its culmination suddenly.

John B. Andrews, Secretary of the American Association for Labor Legislation, stated in a brief submitted to the Committee (p. 115) that the proposed change to charge the last employer only with a "proportion" of the loss "if adopted would be the cause of endless controversy." The witness further stated that "the employer in all cases takes workmen as he finds them and the principal throughout is the same whether the following disability be on account of accident or occupational disease."

H.R. 9498 was the House bill substantially equivalent to S. 3170, which became the Longshoremen's Act.

Congress's decision as to successive employers. Thus, the construction placed upon the statute by the court below implements the dominant Congressional purpose.[7]

In the second place, the rule holding the "last carrier" wholly liable conforms to the general view of disability taken under federal compensation statutes. While it is recognized that disability may be the culmination of a long-developing condition, the disability itself is considered to have come into existence by reason of an "injury" at a specific date, and, if the disability has been occasioned by conditions to which the claimant is still exposed, the employer at that date—and consequently his carrier—is liable. For example, responsibility for a disability may be imposed even though it is clear that the employment was not the sole factor in causing the disability. Thus, the employer is liable for a disability arising out of the employment even though it would not have occurred except for a pre-existing infirmity of the employee. See, *e. g.*, *Friend* v. *Britton*, 220 F. 2d 820 (C.A. D.C.), *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715 (C.A. D.C.), certiorari denied, 290 U. S.

[7] The fact that Congress did not specifically deal with, or consider, this problem does not, of course, prevent its resolution by those charged with the enforcement of the statute. Congress directed that compensation orders should be binding on the carrier as on the employer, Section 35, 33 U.S.C. 935. In carrying out this mandate, it must be determined against which carrier the order should run, and the question cannot be avoided on the ground that the intention of Congress is not expressly stated. Cf. *United States* v. *Klinger*, 199 F. 2d 645, 648 (C.A. 2).

637. Moreover, when the disability results from a slowly developing occupational disease, the symptoms of which are not immediately apparent, the date of the "injury" is assumed to be the date when the condition manifests itself. *Urie* v. *Thompson*, 337 U. S. 163, 170. In this case, that date was September 16, 1953, the first time that the claimant learned he had a permanent disability arising from his employment. The petitioner-carrier had assumed coverage seven days before, and during that time the claimant had continued to work under the conditions which had resulted in, and were increasing, his hearing impairment.

The ruling of the court below holding the last carrier liable for the entire compensation award in these circumstances is the law of several states by statute. See, *e. g.*, *Durham Mfg. Co.* v. *Hutchins*, 115 Ind. App. 479, 58 N. E. 2d 444; *Employers' Liability Assurance Corp.* v. *Merritt*, 117 Ind. App. 697, 75 N. E. 2d 803 (insurer on risk seven days out of twenty-eight years); *Casson* v. *Graham Paige Motor Co.*, 312 Mich. 452, 20 N. W. 2d 270 (insurer on risk three days); *Bye* v. *Interstate Granite Co.*, 230 N. C. 334, 53 S. E. 2d 274; *Gaydosh* v. *Richmond Radiator Co.*, 164 Pa. Super. 154, 63 A. 2d 502; *Pacific Employers Insurance Co.* v. *Industrial Commission*, 108 Utah 123, 157 P. 2d 800. And the New York courts have considered this result required by the provision that "[t]he disablement of an employee resulting from an occupational disease * * * shall be treated as the happening of an accident" (N. Y. Workmen's Com-

pensation Law, Section 38), notwithstanding the fact that the New York law permits apportionment between successive employers (N. Y. Workmen's Compensation Law, Section 44). *Lanzetta* v. *Allied Decorating Co.*, 261 App. Div. 861, 24 N. Y. S. 2d 829 (3d Dep't), affirmed, 287 N. Y. 570, 38 N. E. 2d 230; *Trimboli* v. *Ford Instrument Co.*, 271 App. Div, 854, 66 N. Y. S. 2d 39 (3d Dep't) (insurer on risk one day); *Russo* v. *Despatch Shops, Inc.*, 280 App. Div. 1008, 116 N. Y. S. 2d 788 (3d Dep't) (a deafness case).[8] Moreover, the courts of at least four states have reached the same conclusion in the absence of a guiding statutory provision. *Donahue's Case*, 292 Mass. 329, 198 N. E. 149; *Fitzpatrick's Case*, 331 Mass. 298, 118 N. E. 2d 774; *King* v. *St. Louis Steel Casting Co.*, 353 Mo. 400, 182 S. W. 2d 560; *Textileather Corp.* v. *Great American Indemnity Co.*, 108 N. J. L. 121, 156 A. 840 (insurer on risk twenty days); *Employers Mutual Liability Insurance Co.* v. *McCormick*, 195 Wisc. 410, 217 N. W. 738.[9]

The carrier argues that the ruling of the court below deprived it "of its constitutional rights under its contract of insurance." But even assuming

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[8] As a reading of the cited New York cases indicates, this petitioner-carrier has benefitted, in individual cases, from the "last-carrier" rule as applied by the New York courts.

[9] Most of the states with specific statutory provisions provide that the carrier at the time of the last exposure is liable; in most of those without such provisions, the carrier at the time of disability has been held liable. Inasmuch as in the instant case the claimant was still exposed to the injurious conditions at the time his disability was ascertained, this distinction is immaterial here.

(notwithstanding the provisions of Sections 35 and 36, *supra*, pp. 6-7) that the policy could alter the liability imposed on the carrier by the Longshoremen's Act, this question cannot be raised. The policy is not in the record before this Court, and, indeed, does not appear to have been introduced below.[10] The only question here is the correctness of the decision of the court below as an interpreta-

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[10] Petitioners state (Pet. 15):

> No extended argument is required to show that the respective insurance carriers assumed their liability under express contract in which the time of commencement, as well as termination of liability, is clearly set out. It is elementary that by such policy of insurance, absent legislation to the contrary, the carrier assumes only such liability as accrues during its coverage period. The policy does not provide for the assumption of liability previously incurred, nor does it provide for the shifting of liability to its successor insurance carrier for liability accumulated during its own policy period.

This contention begs the question presented. In substance, it is nothing more than an assertion that a policy of insurance is entered upon, and generally provides that it will terminate upon, specific dates. The question in this case is whether the liability accrued (not whether the disabling condition began) within those dates, and that is the question answered by the ruling of the court below.

Moreover, if petitioners mean to suggest that this Court may assume that no policy is consistent with the imposition of such liability as was found by the court below, then we submit that this is simply not so. For example, the "Standard Provisions for Workmen's Compensation and Employers' Liability Policies," drawn by the National Council on Compensation Insurance, an organization composed of more than one hundred fifty compensation insurers, see Judkins, *National Associations of the United States* (U.S. Dep't of Commerce, 1949), p. 400, contains the following: "This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by ex-

tion of the Longshoremen's Act. This decision accords with the purposes of Congress in adopting the Act, with the view of disability taken under federal compensation laws generally, and with the workmen's compensation law of numerous states. It facilitates the expeditious determination of claims under the Longshoremen's Act, and also permits the insurers themselves to calculate their potential liability with greater certainty. There is no conflict of decision.

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posure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period." The memorandum accompanying the release of these provisions states that this "provides that in a disease case the company covering the insured at the time of the last injurious exposure of the employee in the employment of the insured is the company liable," and that "this statement of coverage follows *the generally accepted and recognized practice of the companies in handling occupational disease cases under the workmen's compensation laws.*" National Council on Compensation Insurance, *Workmen's Compensation and Employers' Liability Insurance Policy and Endorsement Forms* (Oct. 1, 1954), p. 3 (italics added).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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